

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES,

Plaintiff,

vs.

REGINALD DUNLAP *et al.*,

Defendants.

2:08-cr-00283-RCJ-RJJ

ORDER

This matter came before the Court for a hearing on the Government's Motion For the Appointment of a Conflicts Attorney for Defendant Reginald Dunlap (#139). The Court has considered the Government's Motion (#139) and Supplement (#165); Defendant Reginald Dunlap's Response (#153); and the testimony and arguments presented at the hearing on this matter.

BACKGROUND

On October 28, 2008, a federal grand jury returned a multiple-count, multiple-defendant Indictment. The Indictment charges that the various defendants are members of the "Playboy Bloods," a RICO enterprise engaged in a "pattern of racketeering activity." *See* 18 U.S.C. § 1961(4), (5). Defendant Reginald Dunlap is charged with conspiring to engage in a "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(d). He is also charged with violating 18 U.S.C. § 1959(a)(1) and (a)(2) by committing a violent crime, specifically murder, in aid of racketeering activity. It is also alleged that he violated 18 U.S.C. §§ 924(c)(1), 924 (j)(1), and 924(j)(2) by using a firearm during the commission of the alleged murder.¹ The charges carry a potential capital sentence. He has pled not guilty to all charges.

On November 7, 2008, the court entered an order appointing Daniel Albregts to represent

¹ Dunlap is also charged with violating 21 U.S.C. § 846 (conspiring to engage in drug trafficking) and 18 U.S.C. § 2 (aiding and abetting).

1 Dunlap. On January 7, 2009, Dunlap, with all other capitally charged defendants, filed a motion
2 seeking appointment of learned counsel pursuant to 18 U.S.C. § 3005. (#114). The court
3 granted the request and appointed William D. Matthewman, Esq. “learned counsel” for Dunlap.
4 Subsequently, the Government filed this motion requesting that Albrechts be disqualified due to a
5 conflict of interest arising out of his prior representation of a key government witness (hereinafter
6 “Witness A”). (#139). The motion was accompanied by a request for a hearing and suggested
7 procedures for the hearing. (#141).

8 **1. The Government’s Motion to Disqualify and Appoint Conflict Free Counsel**

9 The Government’s motion is straightforward. Albrechts represented Witness A during the
10 grand jury investigation of Dunlap and the other defendants in this case. Witness A testified
11 before the grand jury. Witness A, an unindicted co-conspirator, will be called upon to testify at
12 trial. As such, Albrechts will be faced with the difficult task of examining his former client,
13 Witness A, for the benefit of his current client, Dunlap. The Government argues that Albrechts’
14 competing duties create an impossible ethical dilemma –zealously representing Dunlap while
15 effectively cross-examining Witness A without violating his ethical obligations to either. The
16 Government further argues that the potential conflict is so great that any waiver by Dunlap
17 should be rejected.

18 Albrechts represented Witness A. He met with Witness A on multiple occasions during
19 the grand jury investigation and discussed Witness A’s status in the investigation, grand jury
20 procedure, alternatives regarding cooperation with the government, and testimony before the
21 grand jury. Albrechts fostered the “attorney-client relationship and answered extensive questions
22 regarding whether [Witness A] should cooperate with the government.” Def’s Opposition
23 (#153). He was present during a meeting with the prosecution where there were “extensive
24 discussions regarding Witness A’s testimony, the grand jury procedure, and federal court.” *Id.*
25 He also appeared with Witness A at a meeting with case agents where there was extensive
26 discussion regarding (1) Witness A’s proposed grand jury testimony and (2) Witness A’s
27 involvement and knowledge of the underlying investigation. After being notified that the case
28 was ready to be presented to the grand jury and that Witness A’s testimony would be needed,

1 Albregts met again with Witness A to discuss the process, testimony, options, and importance of
2 Witness A's cooperation with the government. Albregts appeared with Witness A at the grand
3 jury room and conferred with the prosecution prior to Witness A's grand jury testimony. Upon
4 completion of the testimony, Albregts informed Witness A that his representation was complete.

5 After the grand jury returned the Indictment, Albregts was appointed to represent Dunlap.
6 On November 19, 2008, Albregts had an extensive meeting with Dunlap. Albregts immediately
7 suspected that he may have represented Witness A during the underlying investigation leading to
8 Dunlap's indictment. Consequently, Albregts reviewed his files and determined that Witness A
9 was involved in the investigation of this case. Albregts consulted the relevant rules and other
10 attorneys regarding the situation. Ultimately, he determined that the circumstances did not merit
11 his withdrawal because:

12 (1) Witness A had not given him information about Dunlap;

13 (2) His representation of Witness A had been terminated six (6) months prior to his
14 representation of Dunlap;

15 (3) He had no contact with Witness A once the representation ended; and

16 (4) The government had not objected to Albregts appointment.

17 After determining not to withdraw, Albregts visited Dunlap to discuss the conflict issue and to
18 determine whether Dunlap wanted him to remain as counsel. Albregts explained the conflict to
19 Dunlap. Dunlap indicated his desire that Albregts remain his counsel and executed a conflict
20 waiver.

21 Now, Albregts contends that he should not be disqualified because Witness A has no
22 interest in the case. He also contends that he should not be disqualified because he never made
23 an appearance in a "court of law on behalf of Witness A" or "took an adverse position to
24 Dunlap" during his representation of Witness A. Albregts further contends that during the course
25 of his representation of Witness A he did not obtain any confidential information that would
26 hinder his ability to cross-examine Witness A. Finally, Albregts suggests that, even if there is an
27 irreconcilable conflict, the court could circumvent the issue by appointing separate counsel for
28 the sole purpose of cross-examining Witness A.

2. The Disqualification Hearing

On May 12, 2009, the court conducted a hearing to establish an appropriate procedure for moving forward with this motion. As a result of that hearing, the court appointed Douglass Mitchell as independent conflict counsel to Dunlap. The purpose of the appointment was to ensure that Dunlap was fully informed regarding the potential conflict and potential repercussions of waiver. Stanley Hunterton was appointed independent conflict counsel to Witness A for the same purposes. The conflict hearing was scheduled for June 4, 2009. The court anticipated that significant information would be shared with both Dunlap's and Witness A's conflict counsel prior to the June 4 hearing. Unfortunately, the full extent of the information was not adequately disclosed to counsel for the affected parties and the hearing was continued to June 25, 2009.

At the hearing, the Court first inquired of conflict counsel whether they had the opportunity to meet with their respective clients regarding the conflict. The Court also inquired of counsel whether they needed to put any evidence on the record. Satisfied that conflict counsel had adequate opportunity to address the issues with their respective clients, the Court set forth some preliminary requirements to protect the identity of Witness A. Specifically, the parties were instructed to refer to the government witness as Witness A, ascribing no gender or any other indication of identity. These preliminary matters were conducted outside the presence of the defendant.

Once the preliminary requirements were in place, Dunlap was escorted into the courtroom. The Court requested that the Government briefly outline the issue. The Government provided a broad overview of the central issue – whether Albregts should be disqualified because he represented Witness A during the grand jury investigation of Defendant Dunlap. The Government disclosed that Witness A provided information regarding the RICO charge and the homicide charges, the latter of which qualifies Dunlap for a potential capital sentence.

After the Government's broad overview, the Court requested that Dunlap's conflict counsel, Douglass Mitchell, address the issue. The Court specifically requested an indication of the scope and range of discussions counsel had with Dunlap regarding the alleged conflict.

1 Mitchell gave a detailed accounting of his interactions with Dunlap. Without revealing the
2 content of the discussion, Mitchell indicated that Dunlap demonstrated an understanding of the
3 issue, including the duties of loyalty owed by Albregts to the affected parties. Mitchell
4 represented that Dunlap exhibited a specific understanding of how the issues impact him, his
5 case, and the propriety of continuing with Albregts as his counsel. Mitchell also represented that
6 Dunlap expressed a great deal of confidence in Albregts and indicated that a strong, healthy
7 attorney-client relationship had been established. Based on his dealings with Dunlap, Mitchell
8 expressed his belief that any waiver of the conflict was knowing, intelligent, and voluntary.

9 Satisfied with the general background, the Court requested that Mitchell describe the
10 general nature of his conversations with Dunlap. Mitchell stated that he explained to Dunlap that
11 the most significant issues he may face are the lack of knowledge or certainty regarding what
12 Albregts knows regarding Witness A and whether Albregts will use all the information available
13 to him in cross-examining Witness A. Mitchell also explained that Albregts would be in the
14 unenviable position of determining whether to potentially use information acquired while
15 representing Witness A against his former client for the benefit of a different client. Mitchell
16 explained that, in his view, Dunlap had carefully weighed all of the information and determined
17 to waive the conflict and move forward with Albregts. Mitchell agreed with the Government
18 that, if convicted, the conflict would be a potential issue during sentencing.

19 After Mitchell's presentation, the court addressed Albregts directly. The court requested
20 the same general report regarding Albregt's conveyance of the conflict issue to Dunlap prior to
21 the filing of this motion. Conceding that it may not have been with the same thoroughness as
22 Mitchell, Albregts did discuss the same general themes with Dunlap. Albregts also disclosed that
23 he had contacted Witness A to schedule a meeting when he first realized the potential conflict.
24 The meeting did not take place. Albregts has not had any discussions regarding the conflict since
25 the motion to disqualify was filed.

26 After Albregts presentation, the Court addressed Defendant Dunlap directly. Dunlap
27 confirmed the scope and range of his discussions with Mitchell and Albregts. He expressed no
28 additional concerns based on the in-court presentations. The Court then provided Dunlap with a

1 copy of his written conflict waiver. Dunlap acknowledged his signature and explained his
2 understanding of the conflict. Dunlap acknowledged the Court's authority to appoint a conflict
3 free attorney regardless of the waiver. Dunlap expressed his desire to continue with Albregts and
4 represented that he had not been forced to sign the consent, had not been offered or promised
5 anything in exchange for his signature, was healthy and not on any medication when he signed
6 the waiver, and had no access to any drugs or alcohol prior to signing the waiver. Dunlap also
7 stated that he had no discussions with learned counsel regarding Albregts' conflict.

8 After canvassing Dunlap, the Court invited Stanley Hunterton, conflict counsel for
9 Witness A, to set forth the general parameters of his discussions with Witness A. At the outset,
10 Hunterton established that Witness A would not be waiving any conflicts with Abregts.
11 Hunterton explained that his meetings with Witness A were not time intensive as, in his view,
12 this represents a simple, clear-cut issue. Hunterton affirmed Witness A's position that under no
13 circumstances would Witness A consider waiving the conflict. The court then excused Dunlap

14 After Dunlap left, Witness A was escorted into the courtroom. The Court addressed
15 Witness A and explained the purpose for the hearing. The Court confirmed Witness A's
16 discussion with Hunterton. The Court inquired as to whether Witness A would be willing to
17 waive any conflict. The answer was an unequivocal "no." Witness A was dismissed. Dunlap
18 was escorted back into the courtroom and informed that Witness A would not waive the conflict.

19 Against this factual backdrop, the Court invited argument from counsel. The
20 Government argued that, under the applicable rules and law, Albregts has an actual conflict that
21 requires disqualification. The Government also asserted that, at a minimum, the facts show there
22 is a potential conflict requiring that the Court intervene and reject Dunlap's waiver. Finally, the
23 Government noted the practical result of permitting Albregts to continue as Dunlap's counsel –
24 notably the potential for reversal if a conviction is obtained with conflicted counsel still on the
25 case. The Government conceded that it did not believe the conflict should be imputed to learned
26 counsel because there never was an attorney-client relationship established between Witness A
27 and learned counsel. Additionally, learned counsel was not associated with the case or Albregts
28 during the course of his representation of Witness A.

14 DISCUSSION

Contrary to Albregts’ assertion, the circumstances here implicate multiple Rules of Professional Conduct. For example, under Nevada Rule of Professional Conduct (NRPC) 1.6(a), “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”² It cannot be disputed that a vigorous cross-examination in this instance will necessarily touch upon information “relating” to Albregts representation of Witness A. If Witness A’s testimony at trial is inconsistent with the testimony before the grand jury Albregts will be forced to choose which client to serve. Does he attack the credibility and truthfulness of Witness A’s testimony, or does he limit cross-examination to protect Witness A? Either way he chooses he cannot avoid the conflict. That Albregts doesn’t remember whether Witness A gave him confidential information simply underscores the conflict. This situation calls for a waiver under Rule 1.6(a), a waiver which Witness A has emphatically refused to give.

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1 These facts also implicate NRPC 1.7(a) which provides, “[e]xcept as provided in
 2 paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent
 3 conflict of interest.” “A concurrent conflict of interest exists if ... [t]here is a significant risk that
 4 the representation of one or more clients will be materially limited by the lawyer’s responsibility
 5 to another client, a former client or a third person or a personal interest of the lawyer. NRPC
 6 1.7(a)(2) (emphasis added). A lawyer may continue with a concurrent conflict of interest if
 7 certain criteria are satisfied including that “[e]ach affected client gives informed consent,
 8 confirmed in writing.” NRPC 1.7(b)(4). It cannot credibly be contended that there is not a
 9 significant risk of material limitation if a lawyer cross-examines his former client, whom he
 10 represented at the grand jury phase of an investigation, regarding testimony given before the
 11 grand jury that indicted his current client.

12 Finally, Albregts concedes that this scenario implicates NRPC 1.9 but contends that
 13 Dunlap’s interests are not “materially adverse” to Witness A.³ The Court disagrees. Albregts
 14 represented Witness A during the grand jury investigation of this case. The Government
 15 represents that Witness A is an unindicted co-conspirator whose status depends upon truthful
 16 testimony before the grand jury and during trial. Witness A will be called upon to testify in
 17 support of the Government’s case against Dunlap. Witness A and Dunlap’s interests could not
 18 be more diametrically opposed. Once Witness A has testified, Albregts will have an obligation
 19 to challenge the credibility and truthfulness of his former client and his former client’s testimony.
 20 Testimony that he advised be given truthfully. Albregts will also be in a position to challenge
 21 any leniency granted to Witness A in exchange for cooperation – cooperation he advised and
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23 ³ NRPC 1.9(a) provides that “[a] lawyer who has formerly represented a client in a matter shall not
 24 thereafter represent another person in the same or substantially related matter in which that person’s interests
 25 are materially adverse to the interests of the former client unless the former client gives informed consent,
 26 confirmed in writing.” There is no question that Albregts former representation occurred, at a minimum, in
 27 a substantially related matter. “Substantial relationship to the prior representation ... turns not only on factual
 28 identity, but may be presumed where there is ‘a reasonable probability that confidences were disclosed which
 could be used against the client in a later, adverse representation.’” *United States v. Baker*, 10 F.3d 1374,
 1399 (9th Cir. 1993) (citing *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980), *overruled on other ground*
by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)). Based on the record before the Court, there is
 a reasonable probability that confidences were disclosed by Witness A to Albregts that could be used against
 Witness A in this instance.

1 encouraged. Albregts choice in this matter significantly impacts the interests of both Witness A
2 and Dunlap.

3 Under each of aforementioned Rules of Professional Conduct, Albregts representation
4 may continue if both Dunlap and Witness A give informed consent, confirmed in writing. In
5 order to determine whether Dunlap and Witness A were willing to waive the conflict, the Court
6 appointed each separate counsel for this conflict issue. Conflict counsel were given all necessary
7 information to advise their respective clients regarding the potential risks of Albregts continued
8 representation of Dunlap. During the hearing on this matter, the Court inquired regarding the
9 scope and detail of the conflict discussion, including specific discussions regarding the nature
10 and risks presented. Being satisfied that each affected party was adequately and fully informed
11 regarding the potential ramifications of waiver, the Court inquired of each party separately as to
12 whether they were willing to waive any conflicts arising out of Albregts continued representation
13 of Dunlap. Dunlap responded emphatically that he was willing to waive the conflict and wished
14 to continue with Albregts as his counsel. Witness A was equally emphatic in the refusal to waive
15 any conflict for purposes of Albregts' continued representation of Dunlap. The Court agrees
16 with the Government and with conflict counsel to Witness A that Witness A's refusal to waive
17 the conflict under NRPC 1.6, 1.7, and 1.9 is conclusive on the issue and Albregts must be
18 disqualified on this basis alone.

19 **2. The Sixth Amendment**

20 Even assuming Witness A's waiver is not necessary, given the nature and extent of the
21 conflict in this case the Court is comfortable rejecting Dunlap's waiver. Such waivers are not
22 absolute. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall
23 enjoy the right ... to have Assistance of Counsel for his defence." U.S. CONST. AMEND. VI. It
24 also includes "a correlative right to representation that is free from conflicts of interest." *Wood v.*
25 *Georgia*, 450 U.S. 261, 271 (1981). "Even where an actual conflict exists," a defendant "may
26 waive this conflict ... and elect to have the attorney continue representation, so long as the waiver
27 is knowing, intelligent, and voluntary." *United States v. Ross*, 33 F.3d 1507, 1524 (11th Cir.
28 1994); *see also Brady v. United States*, 397 U.S. 742, 748 (1978) ("[W]aivers of constitutional

1 rights not only must be voluntary but must be knowing, intelligent acts done with sufficient
2 awareness of the relevant circumstances and likely consequences.”).

3 The Court bears the “serious and weighty responsibility ... of determining whether there is
4 an intelligent and competent waiver by the accused.” and “must investigate as long and as
5 thoroughly as the circumstances of the case ... demand” before accepting waiver. *Schneckloth v.*
6 *Bustamonte*, 412 U.S. 218, 244 n. 32 (1973) (citation omitted). Although there are no clearly
7 established guidelines for an adequate conflict-waiver colloquy, at a minimum the defendant
8 must be “sufficiently informed of the consequences of his choice” in order for a waiver to be
9 knowing and intelligent. *See Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001) (citation
10 omitted). A defendant is not required to predict particular dilemmas but is required to be aware
11 of all the risks that are likely to develop. *Id.* The choice to waive the Sixth Amendment right to
12 conflict-free counsel must be made with eyes open. *Cf. United States v. Farhad*, 190 F.3d 1097,
13 1099 (9th Cir. 1999). Consequently, although a criminal defendant generally has a presumptive
14 right to counsel of his choice, “that presumption may be overcome not only by a demonstration
15 of actual conflict but by a showing of a serious potential for conflict.” *See Wheat v. United*
16 *States*, 486 U.S. 153, 164 (1988).

17 It must be noted that Dunlap is an indigent defendant who has been appointed counsel.
18 An indigent defendant does not have a constitutional right to be represented by counsel of choice.
19 *See Gonzales v. Knowles*, 515 F.3d 1006, 1013 (9th Cir. 2008) (citing *Caplin & Drysdale,*
20 *Chartered v. United States*, 491 U.S. 617, 624 (1989)). Even assuming the presumption in favor
21 of Dunlap’s right to counsel because “[t]he likelihood and dimensions of nascent conflicts of
22 interests are notoriously hard to predict,” a court is afforded “substantial latitude” to determine
23 whether a conflict merits disqualification. 486 U.S. at 162-63. Disqualification is appropriate,
24 despite the existence of a conflict waiver, not only where there is an actual conflict demonstrated
25 before trial “but in the more common cases where a potential for conflict exists which or may not
26 burgeon into an actual conflict as the trial progresses.” 486 U.S. at 163. “[C]ourts have an
27 independent interest in ensuring that criminal trials are conducted within the ethical standards of
28 the profession and that legal proceedings appear fair to all who observe them.” 486 U.S. at 160.

1 Here, the conflict of interest is clear. The Government has identified Witness A as a key
2 witness in this prosecution. Attorney Albregts represented Witness A during the grand jury
3 phase of this case. Albregts fostered the attorney-client relationship during multiple meetings
4 with Witness A where he discussed Witness A's status in the investigation, grand jury procedure,
5 alternatives to cooperating with the government, testimony, and testifying before the grand jury.
6 Albregts was also present with Witness A during discussions with the Government. Prior to
7 Witness A's grand jury testimony, Albregts discussed the process, testimony, options, and
8 importance of Witness A's cooperation with the government. Albregts was also present with
9 Witness A during discussions with the Government. Prior to Witness A's grand jury testimony,
10 Albregts discussed the process, testimony, options, and importance of Witness A's cooperation
11 with the Government. Witness A testified before the grand jury which, subsequently, returned
12 the Indictment in this case. Witness A allegedly testified regarding the RICO charge and the
13 murder allegations to the grand jury.

14 The potential for conflict here presents an insurmountable division that the Court cannot
15 minimize or overlook. When Witness A is called to testify at trial, Albregts will be in the
16 precarious position of conducting or assisting in the cross-examination of his former client. If
17 Albregts participates in the cross-examination, he will risk violating his ethical obligations to
18 Witness A. If Albregts foregoes the cross-examination, Dunlap may be deprived of his Sixth
19 Amendment right to the effective assistance of counsel. This division of loyalties will be
20 particularly pronounced when, after Witness A testifies on direct examination, Dunlap will be
21 entitled to any relevant statement made by Witness A before the grand jury. *See* FED. R. CRIM. P.
22 26.2 ("After a witness other than the defendant has testified on direct examination, the court, on
23 motion of a party who did not call the witness, must order an attorney for the government or the
24 defendant and the defendant's attorney to produce, for the examination and use of the moving
25 party, any statement of the witness that is in their possession and that relates to the subject matter
26 of the witness's testimony ... As used in this rule, a witness's "statement" means ... the witness's
27 statement to a grand jury, however taken or recorded, or a transcription of such a statement."").
28 Once Witness A testifies, Albregts will be obligated to attack the credibility and truthfulness of

1 Witness A's grand jury testimony. Testimony he advised Witness A to give truthfully.
 2 Testimony given after Albregts advised Witness of the importance of cooperation with the
 3 Government. Testimony given after Albregts advised Witness A of the grand jury procedures
 4 and the alternatives to cooperation with the Government. The potential for conflict in this case is
 5 too great and necessitates Albregts disqualification.⁴

6 CONCLUSION


7 There are no winners here. Dan Albregts appears before this Court on a regular basis and
 8 has earned a reputation as a talented, ethical attorney. However, the facts and circumstances
 9 before the Court present a clear case for disqualification. The Court notes that the Government
 10 does not seek disqualification of learned counsel. Accordingly, this disqualification is as to
 11 Albregts only.

12 ORDER

13 Based on the foregoing, and good cause appearing therefore,

14 IT IS HEREBY ORDERED that the Government's Motion For the Appointment of a
 15 Conflicts Attorney for Defendant Reginald Dunlap (#139) is **GRANTED**.

16 DATED this 6th day of July, 2010.

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 19 ROBERT J. JOHNSTON
 United States Magistrate Judge

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 27 ⁴ Albregts proposes an alternative arrangement wherein he would agree not to participate, in any
 28 way, in the cross examination of Witness A which would, instead, be performed by Learned Counsel. Despite representing that this is a common occurrence, Albregts provides no authority for the proposal. Moreover, given the nature of the charges and potential penalties, the Court is not convinced that constructing a conflict wall between Albregts and Learned Counsel is appropriate.